

Khamkaew (Migration) [2017] AATA 2508 (11 September 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Aphichaya Khamkaew
CASE NUMBER:	1618861
DIBP REFERENCE(S):	BCC2015/445549
MEMBER:	Michael Cooke
DATE:	11 September 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 11 September 2017 at 2:54pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine de facto relationship – Financial pooling – Joint living arrangements – Joint social activities undertaken – Accepted by friends as being in a de facto relationship

LEGISLATION

Acts Interpretation (Registered Relationships) Regulations 2008

Migration Act 1958, ss 5CB, 65

Migration Regulations 1994, r 1.09A, Schedule 2, cl 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 7 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 10 February 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the applicant did not meet the definition of de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 20 July 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Thai and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the parties can satisfy the Tribunal that they are in a genuine de facto partnership.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

8. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
9. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
10. The parties have satisfied the Tribunal that they have evidenced financial pooling.
 - Nature of the household – including any joint responsibility for care and support of children; parties’ living arrangements; and any sharing of housework.
 11. The Tribunal is satisfied from the evidence of the parties’ living arrangements that they maintain a household.
 - Social aspects of the relationship – including whether parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
 12. The parties have provided evidence that they are accepted by friends as being in a de facto relationship with each other. They undertake joint social activities.
 - Nature of persons’ commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
 13. The parties have been involved in their relationship since 2014 and have given oral evidence that they see the relationship as long-term.
 - Any other relevant considerations.
 14. None.
 - Whether the parties are related by family.
 15. The parties are not so related.
 16. The Tribunal has considered r.1.09A(3) matters and finds that the parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and they live together or not separately and apart on a permanent basis, and are not related by family. They meet the requirements of s.5CB(2)(a)-(d) and the definition of de facto partnership.
 17. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
 18. The Tribunal is further satisfied that the applicant was sponsored by her sponsoring partner at time of application and decision and meets cl.820.211(2)(c). She also was a substantive visa holder and satisfied the Schedule 3 requirements in cl.820.211(2)(d). Therefore, the applicant meets cl. 820.211(2) and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

19. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
20. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
21. The applicant has provided evidence that the relationship is registered under NSW law as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5) (T1, f.131).
22. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
23. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

24. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Michael Cooke
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).